

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2003-000320-001 DT

03/16/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED:\_\_\_\_\_

L DAVID COHN

L DAVID COHN  
PO BOX 45031  
PHOENIX AZ 85064

v.

MARY WOLFE (001)

DAVID M HAMPTON

PHX JUSTICE CT-NE  
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

This Court has jurisdiction of this civil appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

**Facts**

The parties entered into a contract for Appellant, Mary Wolfe, dba The Tile Wolfe's, to install tile in a condominium owned by Appellee, L. David Cohn. Appellee was dissatisfied with the workmanship of the tile installation and eventually filed a complaint with the Registrar of Contractors. The complaint filed in the Justice Court sought \$3,500.00 to cover the cost of replacing the poorly installed tile and the costs incurred moving and storing Appellee's furniture while the tile work was being completed. Appellant failed to respond to the complaint within the requisite time. Appellee filed an application for Entry of Default. Appellant then filed an answer and counterclaim. Appellee filed a motion to dismiss the counterclaim. Appellant failed to respond to this motion and the motion was granted. On December 16, 2002, the Justice Court sent both parties a Notice of Mediation and Pre-Trial Conference, to be held on February 19, 2003.

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On the day of the pre-trial conference, a rookie associate<sup>1</sup> of the law firm representing Appellant appeared before the court thinking he was representing Appellant at a settlement conference. Appellant's inexperienced attorney had been handed Appellant's file shortly before the conference and was told to appear at the settlement hearing, and instructed not to settle. It is clear from the transcripts of the pre-trial conference that the young attorney had no idea he was attending a pre-trial conference; he was very confused. The young attorney also misstated the name of the client he was representing, referring to Appellant as an L.L.C., when in fact Appellant was a DBA. After several lectures and a veiled threat to the young attorney's license to practice law, the judge entered a judgment for \$3,500.00 against Appellant, as a sanction for Appellant's failure to appear.

**Issue and Analysis**

The only issue to be addressed is whether the justice court erred in entering a judgment against Appellant as a sanction against Appellant's counsel for failing to participate in a pre-trial conference in good faith, being substantially unprepared, and failing to appear on behalf of the named party. Rule 16(f) of the Arizona Rules of Civil Procedure states:

If a party or attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to **participate in good faith** in a scheduling or pretrial conference or in the preparation of the joint pretrial statement, the judge, upon motion or the judge's own initiative, shall, **except upon a showing of good cause**, make such orders with regard to such conduct as are just, including, among others, any of the orders provided in Rule 37(b)(2)(B), (C), or (D). In lieu of or in addition to any other sanction, the judge shall require the party, or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorneys' fees, or payment of an assessment to the clerk of the court, or both, unless the judge finds that the noncompliance was substantially justified, or that other circumstances make an award of expenses unjust. [emphasis added]

It is clear from the record that the judge was frustrated, and understandably so. However, the judge had a duty to be objective and to consider those factors that concern a "showing of good cause" on the part of the young attorney. When the judge demanded to know if the attorney was

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<sup>1</sup> He passed the bar 7 weeks prior to the pre-trial conference.

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representing Appellant as a corporation or a DBA, the young attorney wasn't sure, responding he was representing "whoever is the named defendant, your honor."<sup>2</sup> The young attorney made a good faith effort to clarify the matter and offered to call his office to find out who was the proper named party.<sup>3</sup> The judge would not permit the young attorney to make the call. This was an abuse of discretion on the part of the trial judge.

It is also clear that the judge was aware the young attorney acted in good faith. When the young attorney stated: "I'm trying to do the best I can,"<sup>4</sup> the judge responded: "I understand, counsel. And I feel for you."<sup>5</sup> It is well settled that sanctions against the client for failure of the party's attorney to attend or participate in a pretrial conference, notwithstanding the presence of good cause, or at least an excusable cause, for an attorney's absence or ill-preparation, is harsh and constitutes an abuse of judicial discretion.<sup>6</sup> Further, where there has been noncompliance with a pre-trial order, a trial judge has broad discretion and responsibility in assuring that the parties are not unduly prejudiced.<sup>7</sup> Perhaps a more appropriate sanction would have been for the trial court to have ordered sanctions against Appellant's counsel of record, or the law firm, rather than judgment on the complaint.

### **Conclusion**

After a careful examination of the record, I find that the trial judge abused his discretion by imposing a sanction (judgment) against Appellant. Although this court is extremely reluctant to disturb the lower court's factual findings, I will not hesitate to correct inequities, abuses of discretion, or legal error.

IT IS THEREFORE ORDERED reversing and vacating the decision and judgment of the Phoenix Justice Court – Northeast.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix Justice Court – Northeast for a new pre-trial conference, and such other and future proceedings as may be necessary.

IT IS FURTHER ORDERED that counsel for Appellant shall lodge an order and judgment consistent with this opinion no later than April 20, 2004.

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<sup>2</sup> Transcript of the Pre-trial Conference held on February 19, 2003, p. 3.

<sup>3</sup> *Id.* at p. 8.

<sup>4</sup> *Id.* at p. 6.

<sup>5</sup> *Id.*

<sup>6</sup> *Stoyer v. Doctors Hospital, Inc.*, 15 Ariz.App. 255, 488 P.2d 191, 55 A.L.R.3d 295 (App. 1971).

<sup>7</sup> *Jansen v. Lichwa*, 13 Ariz.App. 168, 474 P.2d 1020 (App. 1970).